Supreme Court, U. S.
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No. 80-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,

Petitioner,

vs.

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; AND MIDWEST STOCK EXCHANGE SERVICE CORPORATION,

Respondents,

and

NATIONAL LABOR RELATIONS BOARD,

Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION.

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QUESTION PRESENTED FOR REVIEW

The "Question Presented" by Petitioner (Pet. i) does not reflect the facts of this case or the proceedings below. Contrary to Petitioner's assertion, the Court below did not invalidate an election that was "the fair and free choice of the voters". That Court accepted, in full, the Board's findings of fact concerning the election, but found that under the Board's own applicable standard of election conduct, the election was not conducted under the "laboratory conditions" required by the Board's interpretation of the National Labor Relations Act. *General Shoe Corporation,* 77 NLRB 124 (1948); *Milchem,* 170 NLRB 362 (1968). The Court did not substitute its judgment for the Board's, but instead found that by certifying the results of the election, the Board had not been reasonably consistent with its previous decisions in the application of its own standard. *Celanese Corp.* v. *American* v. *NLRB,* 291 F. 2d 244 (7th Cir. 1961).

Here the Board found, and the Union does not dispute, that the Union's official election observer engaged in a series of interactions with employees waiting to vote, including two conversations each of which lasted as long as five minutes. The Board had previously prohibited such conversations under identical circumstances on the grounds that they undermined the "laboratory conditions" necessary for a fair and free election, and set aside the results of the election where such activity did occur. *Milchem, Inc.,* 170 NLRB 362 (1968). Thus, by the Board's own standards, as the Court found, the election at the Exchange could not be considered fair and free.

By insisting that the election at the Exchange *was* a valid election under the Act, Petitioner in fact objects to the Board's *Milchem* standard of election conduct, rather than any decision

of the Court below. The *Milchem* standard was designed by the Board, in the exercise of its Congressionally mandated expertise, to safeguard the fair and free choice of bargaining representatives by employees and thus was well within the Board's wide discretion to regulate elections. *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330-1 (1946). Moreover, since the propriety of the *Milchem* rule was not challenged before the Board or the Court below, it cannot be properly raised for the first time now.

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STATEMENT OF THE CASE

The Union's Petition does not raise any material issues of fact. Nonetheless, Respondents ("the Exchange") present a separate Statement of the Case in order to correct certain misconceptions of fact that may arise from the Statement in the Petition. Inaccuracies in the Union's Statement concerning the

Board's *Milchem* rule and the Court's review of the Board's application of the *Milchem* rule to the facts in this case, are also discussed herein.

This case arose from a representation election conducted by the Labor Board among some of the Exchange's employees. The final tally of ballots showed that the Union won the election by a vote of 182 to 149. (App. 2a.)

The Exchange filed timely objections to the conduct of the election and to conduct affecting the election results, alleging primarily that misconduct by Union election observer James both at and away from the polling area, and the Board agents' failure to prevent that misconduct, interfered with the "laboratory conditions" necessary to a fair election. The Labor Board held a hearing to resolve these issues.[1] (App. 2a.)

The Board's Hearing Officer subsequently issued a "Report and Recommendations on an Objection to Conduct affecting the Results of Election". (App. 23a-34a.) The Hearing Officer credited the Exchange's principal witnesses, observer Sonja Griffin and employee Lynn Douglas, over Union observer James, and found the facts concerning James' misconduct and the Board agents' failure to prevent that misconduct to be as the Exchange contended. Notwithstanding these findings, the Hearing Officer concluded that the conduct of the Union observer and the Board agents was not sufficient as a matter of law to set aside the election. In particular, the Hearing Officer found that the observer's misconduct did not violate the Board's *Milchem* rule against conversations between an observer and employees waiting to vote. (App. 31a.) The Exchange filed Exceptions to the Hearing Officer's Report, but the Board summarily affirmed without opinion the Hearing Officer's Report and cer-

1. Contrary to the Union's statement (Pet. 3), the Exchange's objection and the Labor Board hearing were not limited to James' misconduct. It should also be noted that the Exchange's objection consisted of two pages of text, in addition to the single sentence quoted at Pet. 3.

tified the Union as the exclusive bargaining representative in the unit on September 29, 1978. (App. 21a-22a.)

In order to challenge what the Exchange believed to be gross errors in the Board's Decision, and in the underlying Hearing Officer's Report, the Exchange subsequently refused to bargain with the Union on the ground that the election results, and the Board's certification of the Union as exclusive bargaining representative on the basis of those results, were invalid. The Board summarily ruled that the Exchange's contentions had been previously adjudicated and overruled, found that the Exchange had engaged in an unfair labor practice, and ordered the Exchange to bargain with the Union. (App. 11a-20a.)

The Exchange then petitioned for review to the Court of Appeals for the Seventh Circuit, and the Board cross-appealed for enforcement of its order.[2] On review, the Court below adopted the Board's findings of fact, and accepted the Board's determination that its *Milchem* standard was the controlling rule of election conduct. However, the Court concluded that Union observer James' misconduct was identical to the conduct that caused the election to be set aside in *Milchem*. The Board's refusal to invalidate the election in this case was thus so inconsistent with the Board's election standard announced in *Milchem*, that the Board had either unreasonably misapplied *Milchem* or impermissibly altered its established policy without notice or explanation.[3] For this reason, the Court below refused to enforce the Board's order and vacated the Board's certification of the results of the election.

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2. The Union was permitted to intervene, and participated fully in the briefs and oral argument to the Court below.

3. The Court found it unnecessary to consider the Exchange's objections to observer James' conversations with voters away from the voting area and the Board agents' failure to prevent James' misconduct. These objections are not in issue in the Petition.

From this decision and order, the Union has petitioned for certiorari. The Board has not joined in the Petition, nor filed a Petition of its own.

In order to evaluate the proceedings below, and the Petition now before this Court, it is necessary to understand the Board's *Milchem* standard of election conduct. That standard, which was designed to preserve the integrity of the Board's election processes, was deemed controlling by the Hearing Officer, the Board and the Seventh Circuit in the proceedings below. It has never been overruled by the Board, or criticized by any Court.

In *Milchem, Inc.*, 170 NLRB 362 (1968) a Union representative stood for about five minutes near fifteen employees waiting in line to vote, engaging several of them in conversation. The only evidence as to the content of these conversations was that the representative's remarks "concerned the weather and like topics". *There was no evidence concerning the actual impact of these conversations on employees waiting to vote.* Nonetheless, the Board held that "the sustained conversations [of a party's representative] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election". *Milchem, supra,* 170 NLRB at 362. Whether the conversations between a party and prospective voters consisted of electioneering was irrelevant; they were prohibited. Explaining the basis for this "blanket prohibition" of such conversations, the Board observed, *id.* (emphasis added):

> "Careful consideration of the problem now convinces us that *the potential for distraction, last-minute electioneering or pressure, and unfair advantage* from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations."

Thus, although the Union suggests that the Board intended *only* to prevent electioneering (Pet. 6), the Board in fact in-

tended the *Milchem* "strict rule" to avoid even the *potential* for distraction of voters and unfair advantage as well. Because of the grave difficulty of "recapturing with any precision the nature of the remarks made in the charged atmosphere of a polling place," and because "a blanket prohibit against such conversations is easily understood and simply applied," the Board prohibited the conversations regardless of their content. Where such conversations occurred, the election was so tainted that it would be set aside. This rule protected the rights of all participants—voters, unions and employers—to fair and regular elections. *Accord, Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970); *Volt Technical Co.*, 176 NLRB 832 (1969).[4]

In the case below, the Hearing Officer found that the facts were largely as the Exchange alleged. The crucial facts found by the Hearing Officer were as follows:

1. During the first half-hour of the election period, Union observer James spoke with employee Jerri Thomas for five minutes while she was waiting to vote, in the presence of ten to fifteen other waiting voters. (App. 3a-4a.)

2. When employee Thomas went into the voting room, observer James babysat with Thomas' four year old daughter, chatting and playing with her as she sat on his lap. Throughout this time, James and the little girl were within a few feet

4. To be sure, the Board did place one qualification on its "blanket prohibition": not every "chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will *necessarily* void the election". 170 NLRB 363 (emphasis added). Only where the comments are far shorter than those condemned in *Milchem*, does the Board inquire into their nature and effect. *Cf. NLRB* v. *Bostik Division, USM Corp.*, 517 F. 2d 971 (6th Cir. 1975); *Century City Hospital*, 219 NLRB 52 (1975); *Hecla Mining Co.*, 218 NLRB 61 (1975). This is precisely the "bifurcation" of the *Milchem* rule that the Union considers to be a unilateral creation of the Court below. (Pet. 10.) As we shall demonstrate, the Court correctly found that James' conduct was not within this *de minimus* exception.

of the line of voters, some of whom spoke to or about the child. The Hearing Officer had tried to minimize James' misconduct by finding that the babysitting lasted only "awhile" but the Court correctly observed that the witnesses' estimates ranged from "five" to "fifteen to twenty" minutes.[5] (App. 4a.)

3. One hour after the voting period began, James joked with a prospective voter for three to five minutes in full view of fifteen other employees waiting to vote, stopping only when Board agent Hoffman finally admonished him. (App. 3a.)

4. Sometime during the following 45 minutes, James said hello and shook hands with three voters who had come into the polling area together, in the presence of ten to fifteen waiting employees. After the men had voted, James followed them to the water cooler a few feet beyond the observers' chairs, stood talking to them at the water cooler for "a minute or less" in the presence of ten to fifteen voters, again stopping only when Board agent Hoffman intervened and told James again to limit his conversations with voters. (App. 3a.)

5. On another occasion James left the chair where he had been stationed as an official observer, walked over to a group of seven or eight employees waiting to vote, and whispered to the group for half a minute while the voting line consisted of ten to fifteen prospective voters. (App. 3a.)

6. James engaged in these conversations with voters in disregard of instructions and repeated warnings from Board agent Hoffman.[6]

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5. In fact, James himself testified that he babysat for about twelve minutes. The longer estimate was that of Griffin, whom the Board had credited as a "particularly careful" witness. Although the Court refrained from injecting this fact into the Hearing Officer's opinion, it is apparent that the longer estimates are more accurate. However, this point is not necessary to the Petition.

6. The Hearing Officer also had found, in contrast, that the Exchange's observer Sonja Griffin, took the Board agents' instruc-

(Footnote continued on next page.)

These are the facts that are material to this case.[7]

On the basis of these facts, which were precisely as the Exchange alleged, the Hearing Officer found and the Labor Board agreed that Union observer James' conversations and babysitting did not violate the Board's *Milchem* prohibition against conversations between a party's observer and employees waiting to vote. On review, however, the Seventh Circuit strongly disagreed.

It must be emphasized that in reaching a conclusion contrary to the Board, the Court accepted the Board's *Milchem* standard and also its determination that *Milchem* controlled the present case. Further, the Court also expressly accepted the facts found by the Hearing Officer and adopted by the Board. See p. 3 above. The Court's sole inquiry was whether the Board had applied its own *Milchem* rule fairly and reasonably consistently with its previous decisions. App. 6a-7a; *accord, Celanese Corp. of America* v. *NLRB*, 291 F. 2d 224, 225 (7th Cir. 1961).

In its analysis, the Court summarized *Milchem* as follows, App. 7a-8a:

(Footnote continued from preceding page.)
tions seriously and scrupulously requested permission before discussing with her roommate their transportation problems created by the snow storm going on at the time. (App. 27a.) However, because the Hearing Officer did not consider James' conduct improper she found that the Board agent had fulfilled their duties, without carefully considering the evidence of their attempts and failures to prevent James' conduct. Because the Court also found it unnecessary to consider the Board agents' conduct as a separate ground for invalidating the election, we do not reach this issue here.

7. The Court found that James' five minute conversation with voter Thomas was alone a sufficient indication that the Board had applied its own standard improperly. It was thus unnecessary for the Court to consider the Hearing Officer's findings concerning James' unsupervised conversations with employees away from the polling area, and those findings are not repeated here.

> "The Board reaffirmed its commitment to insure the integrity of the election process when, in *Milchem, supra,* it declared that elections would be overturned where representatives of any party to the election engaged in 'prolonged' conversations with voters waiting to cast their ballots, regardless of the content of the remarks exchanged. 170 NLRB at 362. The Board reasoned that the potential for distraction, last minute electioneering, and unfair advantage, justified a 'strict rule' against such conduct, without requiring an examination into the substance or effect of the conversations. *Id.* Recognizing the impossible task of eliminating all conversations in the polling area, the Board stated that its rule would not necessarily void elections upon the occurrence of 'any chance, isolated, or innocuous comment'. *Id.* at 363. Without defining the point at which a 'trifling' comment becomes a prolonged conversation, the Board set aside an election where a union representative had engaged in an estimated five minutes conversation."

The undisputed facts showed that the conversation between Union observer James and employee Thomas also lasted approximately five minutes and was identical in kind to the conversation prohibited in *Milchem.* Consequently, the Court could not uphold the Board's conclusion that the *Milchem* standard was not violated because James' conversations were not "prolonged".[8]

The Court also found that the other purported "distinctions" between the conduct in *Milchem* and James' conversation, cited by the Board to justify its decision, were not distinctions at all, and were irrelevant to the Board's stated rules. Thus, the Board's finding that James' conversations did not violate *Milchem*

8. The Union contends that the Court below gave too much weight to Griffin's estimate that the conversation lasted five minutes. However, that estimate was cited by the Board, which found Griffin to be a "particularly careful" witness. (App. 25a.) The Union's attempt for the first time in its Petition to overturn the Board's credibility determination is untimely and not a proper topic before this Court for review.

because they did not "even suggest the appearance of electioneering, the basis for the *Milchem* proscription of conversation" was a radical and illogical departure from *Milchem's* purpose and rationale. As the Court observed, the Board had determined in *Milchem* to prohibit conversations without inquiry into their substance or effect not only because of the potential for last-minute electioneering but also because of the potential for distraction of voters during the last few minutes before casting their votes. The Court concluded, App. 9a:

> "[T]he Board here perverted *Milchem* insofar as its decision was predicated in anywise upon a consideration of the content of Jame's conversation or the appearance of his conduct."

Similarly, the Board's attempt to distinguish from *Milchem*, James' conversation with voter Thomas, on the ground that the James-Thomas conversation was not a "one-to-one conversation" was at odds with the specific facts of *Milchem*. The *Milchem* conversation itself was *not* "one-to-one," yet it caused the election to be set aside. 170 NLRB 364.[9] Having carefully considered each of the Board's attempts to justify its departure from *Milchem*, the Court concluded that "the Board's application of its rule was not reasonably consistent with Milchem or with its subsequent decisions," refused to enforce the Board's bargaining order, and vacated the certification of the election results. (App. 10a.)

In sum, the Court did not overrule the Board's findings of fact, nor question the Board's authority to adopt the *Milchem* rule and to apply it in the present case. The Court merely reviewed the Board's decision to insure that the Board had applied its chosen standard of election fairly and with conduct reasonable consistently. Because Union observer James' mis-

9. Indeed, that James' conversations drew the attention of more than the single voter he was addressing logically increased, rather than decreased, the potential for distraction of voters, the very evil the *Milchem* rule was designed to avoid.

conduct was identical to that condemned in *Milchem*, and because the "distinctions" relied on by the Board to justify its inconsistent rulings were either illusory or antithetical to the Board's announced and unaltered policies, the Seventh Circuit held that the Board had not in this case correctly applied its chosen standard. Therefore, the Court refused to enforce the Board's order. Far from invalidating an election representing "the fair and free choice of the voters," the Court's decision insured that the Board's high standards of election conduct and fairness would be preserved. *Cf. General Shoe Corporation*, 77 NLRB 124 (1948).

ARGUMENT

Certiorari is unnecessary and inappropriate in the present case. The Seventh Circuit's decision not to enforce a Board order that is unreasonably inconsistent with the Board's stated, and unaltered, *Milchem* standard of election conduct was both correct and uncontroversial. The decision does not raise any issue that is a matter of conflict among the circuits, or of sufficient public importance to merit consideration by this Court, and the Petition should therefore be dismissed.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE BOARD'S DISCRETION TO PROMULGATE A STRICT RULE OF ELECTION CONDUCT AGAINST CONVERSATIONS BETWEEN A UNION OR EMPLOYER REPRESENTATIVE AND EMPLOYEES STANDING IN LINE WAITING TO VOTE

In its Statement of the "Question Presented" in its Petition, the Union assumes that the Seventh Circuit has invalidated a National Labor Relations Board election "which is the fair and free choice of the voters". This assumption, as explained in its Petition (Pet. 7-9), is a challenge to the Seventh Circuit's failure to consider whether the observer's conduct had any actual impact on a specific voter, or any demonstrable effect on the vote tally as a whole, before determining to invalidate the election. But the Seventh Circuit's decision was dictated by the *Milchem* standard, as announced and applied by the Board. It is the *Board*, not the Seventh Circuit, that has prohibited sustained conversations between observers and employees waiting

to vote without requiring "an examination into their substance and effect". 170 NLRB 362.[10]

Thus, the Union's real disagreement is with the Board's creation of the *Milchem* standard. However, this standard is well within the "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" that has been entrusted by Congress to the Board. *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330-1 (1946). In *A. J. Tower Co.*, this Court specifically endorsed the Board's strict rule against untimely voter challenges *even though the rule might result in an inaccurate reflection of the desires of eligible voters*, because of the counterbalancing potential for disruption of the electoral process without the rule, *Id.*:

> "The rule does not pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. *It is simply a justifiable and reasonable adjustment of the democratic process.*"

Accord, General Shoe Corp., 77 NLRB 124, 127 (1948).

As noted above, the Board carefully crafted the *Milchem* prohibition to avoid the grave potential for last-minute distraction of the sort specified, and to spare the parties and the Board the difficult task of investigating the actual content and effect of conversations during the critical moments before an employee voted. The *Milchem* rule was all the more reasonable because of the ease of administration and compliance: a party could avoid invalidating an election, merely by instructing its representatives not to violate the *Milchem* rule. Thus, there can be no serious

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10. This aspect of the Board's *Milchem* rule distinguishes this case from those cases, unnamed by the Union, which "involve threats and coercion in the voting process, . . . misrepresentation of facts by campaigners, and . . . fair procedures in the balloting process itself" in which, according to the Union, "reviewing courts almost always inquire as to whether the challenged conduct had an unfair or wrongful impact upon the free choice of voters". (Pet. 13.)

question that the *Milchem* creation of a "blanket prohibition" against conversations between a party's representative and employees in the voting line was a reasonable exercise of the Board's discretion to set formal standards of election conduct.

The Union protests that the Exchange's employees have lost their right to a "free and fair choice" of collective bargaining representative. But it is the *Board's* decision, in the proper exercise of its discretion, that an observer's potentially distracting prolonged conversation with waiting voters automatically impairs the fairness of the election, and that the danger of such conduct is so great that it must be flatly prohibited, without case-by-case determinations of the conduct's demonstrable effect on the election results. No court has questioned the validity of this *Milchem* rule. *Cf. Sonoco Products Co.* v. *NLRB*, 443 F. 2d 1334, 1337 (9th Cir. 1971); *NLRB* v. *Bostik Division, USM Corporation*, 517 F. 2d 971 (6th Cir. 1975). There is thus no conflict of judicial opinion for this Court to resolve.

Moreover, in the proceedings below, the Union did not ask either the Board or the Court to reconsider the validity of *Milchem*. To the extent that the Union seeks merely a modification of the Board's own discretionary standards, but has not yet made this request of the Board, this question is not of such public importance that it should be considered at this time by the Court. Thus, neither the Board's exercise of its discretion to regulate representation elections, its adoption of the strict *Milchem* standard, nor the reviewing court's application of the strict rule, warrant review by this Court.[11]

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11. The Union also appears to object to the "five-minute limit" which it contends was arbitrary and improperly imposed on observer conversations by the Seventh Circuit. (Pet. 7-8, 17-18.) But this objection manifestly does not reflect the Court's decision. The Court merely held that when the Board prohibited "prolonged" conversations, and included in that prohibition one five minute conversation, the Board could not later condone another five minute conversation under identical circumstances without explaining this readily apparent inconsistency.

II.

THE COURT BELOW PROPERLY APPLIED A LONG ESTABLISHED AND UNIVERSALLY ACCEPTED STANDARD OF JUDICIAL REVIEW TO THE BOARD'S DECISION

The question initially presented by the Union (Pet. i)—May a reviewing court invalidate a National Labor Relations Board representation election which is the fair and free choice of the voters solely because the court's interpretation of a Board rule of law is different from that applied by the Board?—appears to be a challenge to the standard of judicial review applied by the Seventh Circuit to the Board's decision. However, the question misrepresents the Court's decision. Although the Court certainly disagreed with the Board's application of *Milchem in this case*, the interpretation of the *Milchem* rule applied by the Court was precisely the interpretation applied by the Board in *Milchem* and subsequent decisions. The Court simply investigated whether the Board had applied its own *Milchem* rule to the facts found by the Board in a manner reasonably consistent with its previous decisions. This inquiry on review is in accord with the decisions of this Court and of the appellate courts.[12] *NLRB* v. *A. J. Tower Co., supra; Celanese Corp. of America* v. *NLRB, supra; Monmouth Medical Center* v. *NLRB*, 604 F. 2d 820, 823 (3d Cir. 1979); *Hometown Foods, Inc.* v. *NLRB*, 416 F. 2d 392, 395 (5th Cir. 1969); *Delta Drilling Co.* v. *NLRB*, 406 F. 2d 109 (5th Cir. 1969). *Cf. FTC* v. *Mary Carter Paint Co.*, 382 U. S. 46 (1965); *Greater Boston Television Corp.* v. *FCC*, 444

12. The Union asks, "[E]ven when a reviewing court disagrees with the Board's own interpretation and application of its own policy, should a decision be set aside absent a demonstrable abuse of discretion by the agency?" (Pet. 15.) In this case, the Seventh Circuit's decision was tantamount to a finding that the Board had abused its discretion: The Board abuses its discretion by failing to make decisions that are reasonably consistent with its precedents. *See Monmouth Medical Center* v. *NLRB, supra; NLRB* v. *Osborn Transportation, Inc.*, 589 F. 2d 1275, 1279 (5th Cir. 1979).

F. 2d 841, 852 (D. C. Cir.), *cert. denied*, 403 U. S. 923 (1971).

The Seventh Circuit explained the standard of review with admirable clarity in its opinion, App. 6a-7a:

> "In *Clelanese Corp. of America* v. *NLRB*, 291 F. 2d 224, 225 (7th Cir. 1961), this Court held that the Board's 'wide discretion' lies in the initial promulgation of rules and regulations establishing the procedures and safeguards for conducting representation elections. *See also NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946). We went on to say, however, that the courts of appeals bear the responsibility of reviewing the Board's specific application of its rules. 291 F. 2d at 225. 'Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.' *Id. See also NLRB* v. *Mosey Mfg. Co., Inc.*, 595 F. 2d 375, 377 n. 5 (7th Cir. 1979).
>
> The Board is not forever bound by its prior declarations of policy, and is free, for example, to exercise its discretion to alter its rules when, in the wisdom gained through experience, it concludes that its rules have failed to effectively safeguard elections or when it finds a rule to be unduly burdensome. *NLRB* v. *Mosey, supra*, 592 F. 2d at 375. Where the Board has promulgated standards governing the conduct of an election, however, those standards are controlling until the Board announces a change and its reason for the change. *See Delta Drilling Co.* v. *NLRB*, 406 F. 2d 109 (5th Cir. 1969). Until such a change is announced, the Board's application of its standards must be reasonably consistent with its previous decisions."

This is precisely the standard of review that this Court endorsed in *FTC* v. *Mary Carter Paint Co.*, 382 U. S. 46 (1965). In that case, this Court held that the Fifth Circuit improperly had overturned a ruling of the Federal Trade Commission, because the FTC's decision did not constitute "a departure from Commission policy," and thus was neither arbitrary nor clearly

wrong. 382 U. S. at 47, 49. This is directly analogous to the standard applied by the Seventh Circuit to the Board's decision in the present case.

The cases cited by the Union as demonstrating "a great diversion in principle where decision-making is involved" (Pet. 20) do not conflict with this standard of review. The Union correctly states that in *NLRB* v. *Allis-Chalmers Corp.*, 601 F. 2d 870 (5th Cir. 1979), the Court deferred to the Board's application of its own rules. But on rehearing, the Court reversed itself, denied enforcement of the Board's order and remanded the case to the Board. 608 F. 2d 1018 (5th Cir. 1979). At issue was the Board's application of its *Formco* rule that pre-election misstatements by the union concerning Board functions required a new election regardless of any opportunity the employer had to respond. *Formco, Inc.*, 233 NLRB 61 (1977). In *Allis-Chalmers*, the Board had refused to set aside an election despite such misrepresentations. The court initially resolved this apparent inconsistency with *Formco* by observing that in *Allis-Chalmers*, the union, as well as the employer, had sought to correct the union's misstatements, and that *Formco* was not a *per se* rule. On rehearing, however, the court questioned the accuracy of its conclusion that the Board had found that corrections by the union distinguished the case from *Formco*. The court refused to enforce the order in the absence of any reconciliation of the case with *Formco*, and instead remanded for clarification by the Board. This decision on rehearing is consistent with the Seventh Circuit's refusal to enforce the Board's order below, where the Board could not satisfactorily distinguish this case from *Milchem*.[13]

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13. Although the Fifth Circuit remanded *Allis-Chalmers* to the Board, it did so in order to permit the Board to explain the apparent inconsistency in its decisions. Here, the Board has already attempted to distinguish *Milchem*, and as noted above, the Seventh Circuit has properly determined that the Board had failed. Remand for further explanation from the Board is thus unnecessary.

This Court's decision in *NLRB* v. *Mattison Machine Works*, 365 U. S. 123 (1961), and the decision of the First Circuit in *Melrose-Wakefield Hospital Assn.* v. *NLRB*, 615 F. 2d 563 (1st Cir. 1980), also cited by the Union, are not inconsistent with the decision of the Seventh Circuit in this case. In *Mattison Machine Works* and *Melrose-Wakefield Hospital Association*, the courts deferred to the Board's application of its own rules, but in neither case had the Board cited specious "distinctions" in order to differentiate unreasonably between two identical sets of circumstances and reach a result unreasonably inconsistent with its prior decisions. These decisions do not conflict with the Seventh Circuit's refusal to enforce the order in this case because it was not reasonably consistent with *Milchem*. There is no reason for this Court to review this long-established and undisputed standard of review.

CONCLUSION.

For all the reasons stated above, Respondents contend that the Petition for Writ of Certiorari presents no issue warranting review by this Court, and pray that the Petition be denied.

Respectfully submitted,

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